Nos. 96-1731, 96-1732

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

LESLIE AND DOROTHY BISHOFBERGER,

Petitioners,

—against—

IN RE: PRUDENTIAL SECURITIES INCORPORATED LIMITED PARTNERSHIP LITIGATION, MDL DOCKET NO. 1005,

Respondent.

MACDANIEL JACKSON and MIRIAM JACKSON,

Petitioners,

—against—

IN RE: PRUDENTIAL SECURITIES INCORPORATED LIMITED PARTNERSHIP LITIGATION, MDL DOCKET NO. 1005,

Respondent.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT PRUDENTIAL SECURITIES INCORPORATED IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

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30 pp

QUESTIONS PRESENTED

By the Bishofberger Petitioners

Where an absent class member admittedly received the mailed notice of a class action settlement over one month prior to the opt-out deadline but inexplicably failed to take any steps to opt out, was the court below correct in affirming the district court's discretionary denial of that class member's request belatedly to opt out of the class under Rule 60(b)?

By the Jackson Petitioners

Where notice of a class action settlement was mailed to an absent class member prior to the expiration of the opt-out period and the class member did not carry his burden of establishing that he did not receive it, was the court below correct in affirming the district court's discretionary denial of that class member's request belatedly to opt out of the class under Rules 6(b) and 60(b)?

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Respondent Prudential Securities Incorporated ("PSI")[1] respectfully submits that writs of certiorari to review the decisions of the United States Court of Appeals for the Second Circuit should not issue because these decisions do not conflict—nor are they even said by either Petitioner to conflict—with that of any other circuit, because no question worthy of the exercise of this Court's certiorari jurisdiction is presented and because, in any event, the decisions below are in all respects correct.

COUNTER-STATEMENT OF THE CASE

The factual statements in the petitions contain numerous misstatements and omissions which necessitate this counter-statement pursuant to Supreme Court Rule 15.2.

These Petitions are related to a pending Petition filed by John D. and Christal Toland ("the Tolands"), Docket No. 96-1538. All three petitions arise out of the $110 million partial settlement in a multi-districted class action styled *In re Prudential Securities Incorporated Limited Partnerships Litigation*, MDL No. 1005 ("MDL 1005"). Like the Tolands, Petitioners Leslie and Dorothy Bishofberger ("the Bishofbergers") and MacDaniel and Miriam Jackson ("the Jacksons") are members of the Class certified by the Final Judgment entered by Senior United States District Judge Milton Pollack of the Southern District of New York. Because they neglected to exclude themselves from the Class by opting out prior to the court-imposed deadline, Petitioners are now bound by the Final Judgment, including its provision enjoining the continued prosecution of Settled Claims against

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[1] Pursuant to Supreme Court Rule 29.6, PSI advises the Court that neither it nor its ultimate parent, The Prudential Insurance Company of America, a mutual insurance company, nor any subsidiary or affiliate has issued shares to the public.

PSI and other Released Parties.[2] Like the Tolands, Petitioners seek the issuance by this Court of writs of certiorari to review the parochial and inherently fact-specific issues of whether the Court of Appeals properly affirmed Judge Pollack's denial of their respective motions, pursuant to Rules 6(b) and 60(b) of the Federal Rules of Civil Procedure, for extraordinary relief from the Final Judgment and permission belatedly to opt out of the Class in order to prosecute claims against PSI which are barred and enjoined by the Final Judgment.

Background

The factual background of MDL 1005, the terms of the Settlement (including the court-ordered procedures for the dissemination of the Notice) and the course of the proceedings in the District Court to confirm the Settlement leading up to and including the entry of the Final Judgment—all of which are fundamental to an understanding of the issues raised by these Petitions and yet are only cursorily (and even then, often inaccurately) mentioned therein—are described in detail in PSI's Brief in Opposition to the Tolands' Petition ("Br. Opp."). To avoid needless repetition, PSI respectfully refers the Court thereto (Br. Opp. at 3-9), and sets forth below only those facts relevant to the individual circumstances of Petitioners Bishofberger and Jackson, respectively.

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[2] Capitalized terms have the same meaning ascribed to them in the Settlement Agreement found in the Appendix filed with the Court of Appeals at A65-A73. In addition, references herein to the Petitions are designated as "[name of petitioner] Pet. at ___." References herein to the Appendices annexed thereto are designated as "[name of petitioner] Pet. App. at ___"). References to the Appendix hereto are designated as "App at ___". References to "A ___" are to the Appendices filed by Appellants in the Court of Appeals for the Second Circuit on their appeal below.

Petitioners' Post-Judgment Motions

Leslie and Dorothy Bishofberger

Although the Bishofbergers acknowledged that they received the Class Notice in "late September" 1995—over one month prior to the October 30, 1995 deadline set by the court for filing exclusions from the Class (A1541)—they argued that they had no reason to believe it applied to them because they erroneously thought that they fell within an exclusion to the Class definition for investors who had executed timely submission agreements and agreed to be bound by the Expedited Dispute Arbitration Procedure ("EDAP") under the SEC Fund.[3] However, through their own neglect, the Bishofbergers' submission agreement to EDAP was in fact not filed with the SEC Claims Administrator until October 19, 1995 (over three months after the July 6, 1995 deadline for doing so (A1559-60)) and thus their request to participate in EDAP was denied in that forum.

In support of their Rule 60(b) motion, the Bishofbergers contended that "[t]he SEC Claims Administrator can hear our

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[3] Prior to the consolidation in MDL 1005 of the various private actions filed against PSI, PSI and the Securities Exchange Commission ("SEC") entered into a consent decree under which PSI agreed to provide reparations to settle claims arising out of the same limited partnership failures at issue in MDL 1005 (the "SEC Fund"). (A607) The SEC Fund was under the general supervision of the United States District Court for the District of Columbia (Greene, J.) and was presided over by a Court-approved Claims Administrator, former SEC Commissioner Irving Pollack. (A607) The SEC Fund's Claims Resolution Process required PSI to mail notices to all eligible investors informing them of the SEC Fund. Eligible investors were then required to submit claims directly to PSI. PSI was obligated either to offer the claimant a monetary settlement or reject the claim. Investors who were dissatisfied with PSI's monetary offer, or whose claims PSI rejected, could either pursue their claims in other fora or enter EDAP. (A607-08) Investors who wished to participate in EDAP were required to complete and timely file a submission agreement. (A608) The database of investors created to comply with the SEC Fund requirements was later utilized to send the Class Notices in MDL 1005.

request for excusable neglect to allow us back into the SEC process However, he can only hear this if we are excluded from this class action." (A1583) Thus, the Bishofbergers needed to demonstrate excusable neglect before Judge Pollack in order to argue additional excusable neglect before the SEC Claims Administrator—a request Judge Pollack politely deemed "highly irregular." (A1584)

Moreover, the Bishofbergers' moving papers admitted that, aside from their professed confusion over their status vis-a-vis the SEC EDAP proceedings, by October 12, 1995—over two weeks prior to the opt-out deadline set by Judge Pollack—they were aware that they had not filed a submission agreement in accordance with EDAP and that the deadline for doing so had long passed. (A1541-42) The Bishofbergers, then, were fully aware on October 12, 1995 that they were Class Members bound by the Settlement unless they opted out by October 30, 1995. Despite this knowledge and this 18-day window, the Bishofbergers neither timely opted out nor initiated contact with the SEC Claims Administrator to determine if they were still eligible to participate in that Fund, nor initiated contact with Lead Class Counsel (whose names, addresses and telephone numbers were listed on the Notice that they received in September 1995) for guidance about the consequences of failing to opt out in a timely manner.

The Bishofbergers maintained that their startling neglect in connection with both the SEC Fund and the Class Settlement proceedings was excusable due to the illness of their "financial advisor" and former broker. (A1540) They claim to have relied on this lay advisor, who never submitted an affidavit, for advice in filling out forms and to assure that deadlines were met. (A1534) His illness apparently lasted several months (although he was fit to counsel them in late September 1995 when they received the Notice (A1542)) and throughout that time they never took any action to inquire as to their status in either the SEC Fund or the Class Settlement. This, however, was not the end of their lethargy, for despite

having received notification on November 11, 1995 that their request for submission to EDAP was rejected for tardiness (A1548), the Bishofbergers neither attended the November 17, 1995 Fairness Hearing nor raised any timely objection to the Settlement.

Judge Pollack denied the Bishofbergers' motion for extraordinary relief (A1610) and they thereafter appealed to the Court of Appeals.[4]

MacDaniel and Miriam Jackson

The Jacksons moved pursuant to Rules 6(b) and 60(b) to be excluded from the Class in order to proceed with the prosecution of their pending arbitration against PSI. (A745) The Jacksons premised their motion on their alleged untimely receipt of the Class Notice. The Jacksons do not dispute that the Class Notice was mailed to them, nor that they received it. The Claims Administrator confirmed that in fact two Notices, one for Mr. Jackson personally and one for his IRA account, were mailed to him on September 11, 1995. (A805c) Nevertheless, Mr. Jackson, a former PSI employee and industry insider, asserted that he did not receive the Class Notice until (and first learned of the widely publicized Settlement on) December 7, 1995 because it was sent to his former PSI office address, which was the last address shown for him on the PSI database utilized by the Claims Administrator for mailing the Class Notice.

The Jacksons argued that PSI's failure to provide the Claims Administrator with their current address, which led to

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[4] The Bishofbergers' and their counsel's campaign of apathy continues in this Court. The Bishofbergers did not file their Petition until April 28, 1997—122 days after the Court of Appeals' entry of the Summary Order affirming the District Court's denial of their motion. To circumvent their violation of Supreme Court Rule 13.1, the Bishofbergers attempt to piggy-back onto the Jacksons' petition for rehearing below—in which they did not join. As set forth, *infra*, the Bishofbergers' Petition is untimely and should be denied on that ground alone.

the purported delay in their receipt of the Class Notice, constitutes sufficient grounds for extraordinary relief. (A748) Pretermitting the legal irrelevance of this argument, PSI submitted an affidavit from Joseph Nottolo, the Operations Manager at the PSI branch where Mr. Jackson was formerly employed. (A805d) Mr. Nottolo attested that in the ordinary course of business any mail addressed to Mr. Jackson was routinely "forward[ed] . . . to Mr. Jackson on the day it [was] received or, at the very latest, one day after its receipt" at the branch. (A805e) In addition, Mr. Nottolo specifically denied the Jacksons' unsupported speculation that he had delayed forwarding the Class Notice to Mr. Jackson. (A805e)

Judge Pollack was skeptical of the Jacksons' contention that they did not receive the Class Notice until the same day that their lawyer called them to inquire as to its receipt and denied the Jacksons' motion as well as their subsequent motion for reconsideration. The Jacksons thereafter filed several notices of appeal.[5]

The Decisions of the Court of Appeals

The Bishofbergers' and Jacksons' appeals were consolidated in the Court of Appeals with four other appeals (including the Tolands') from Judge Pollack's orders denying requests for permission belatedly to opt out of the Class. On December 27, 1996, the Court of Appeals unanimously and summarily affirmed each of those orders appealed from.

With respect to the Bishofbergers, the Court of Appeals held that given their admitted timely receipt of the Notice,

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[5] The Jacksons were the only members of this 100,000-plus member Class to purport to appeal from the Final Judgment approving the Settlement—notwithstanding the untimeliness of their appeal and their dubious assumption of standing to do so. On PSI's motion, the Court of Appeals dismissed as untimely that part of the Jacksons' appeal which purported to be from the Final Judgment. They do not challenge that dismissal in this Court.

their knowledge that their EDAP form had not been timely filed and their failure to heed the Notice's warning that they should consult an attorney regarding any questions, Judge Pollack did not abuse his discretion in denying their motion. (Toland Pet. App. at 23) This purported abuse of discretion by the District Court is what the Bishofbergers presently seek to have reviewed by this Court.

As for the Jacksons, the Court of Appeals noted that as the movants they had the burden of proof to demonstrate sufficient grounds for extraordinary relief. (Toland Pet. App. at 11) The Court of Appeals held that the District Court's determination that the Jacksons had failed to meet their burden and the court's "skepticism" concerning Mr. Jackson's claim that he did not receive the two Notices until after the opt-out deadline were not abuses of discretion. *Id.* The Jacksons thereafter petitioned the Court of Appeals for rehearing, which was denied on January 27, 1997. (Jackson Pet. at 10)

SUMMARY OF ARGUMENT

The instant Petitions seek writs of certiorari to review the myriad and fact-specific excuses offered by Petitioners (and rejected by the courts below) for their failures to opt out of the Class in a timely manner. The facial "uncertworthiness" of these Petitions is perhaps best described by the Bishofbergers themselves who candidly acknowledge that the "narrow issue before this court [sic] is whether the district court abused its discretion in denying the Bishofbergers the right to opt out of the class after the initial deadline had passed." (Bishofberger Pet. at 4) We are hard pressed better to articulate why this Court—which is not in the business of curing putative abuses of discretion, *vel non*—should deny their Petition.

The Jacksons, whose credibility the District Court questioned, attempt to obfuscate the parochial nature of their Petition and instead urge that the garden-variety, prototypical

notice procedures adopted by the District Court failed to satisfy due process because they did not *guarantee* that the Jacksons would receive the Notice in a timely manner. This Court has now been presented with three Petitions in this matter, all of which challenge the propriety of the Notice procedures. And yet, interestingly, none of the Petitioners before this Court established that they failed to receive some notice of the Class proceedings prior to the expiration of the opt-out period. The Tolands, for example, admitted (Toland Pet. at 9) that they were on actual notice of the Class Settlement nearly two weeks before the expiration of the opt-out period. The Bishofbergers likewise admit (Bishofberger Pet. at 3) that they received the Notice over one month prior to the opt-out deadline. The Jacksons failed to persuade the District Court that they did not receive in a timely manner the two Notices mailed to them notwithstanding their ambiguous assertions to the contrary. These facts, coupled with the overwhelming response of this 100,000-member Class to the mailed notice program (Br. Opp. at 23 n23), render unavailing Petitioners' individual and collective efforts to fashion a grievance of constitutional magnitude.

In short, these Petitions represent nothing more than yet another effort by disappointed litigants to reargue the merits of their motions which were fully and fairly litigated in both courts below. Like the Tolands, Petitioners do not identify, nor does there exist, any ground upon which writs of certiorari should be granted. None of the questions purportedly raised by the Petitions presents either a conflict among the circuits, a conflict between the ruling of the Court of Appeals and any ruling of this Court, or any otherwise important and unresolved federal question of general and widespread applicability. To say they are fact-specific is an understatement.

REASONS FOR DENYING THE WRITS

I. THE BISHOFBERGERS' PETITION IS UNTIMELY

At the outset, the Court should deny the Bishofbergers' Petition because it is untimely under Supreme Court Rule 13.1, which provides that a petition for a writ of certiorari must be filed within ninety days after entry of the judgment of the court below. Although the Court of Appeals entered its judgment on the Bishofbergers' appeal on December 27, 1996 (Toland Pet. App. at 1), they did not file their Petition until April 28, 1997, well over ninety days later.

The Bishofbergers attempt to avoid the consequences of their latest procedural gaffe by noting that their Petition was filed within ninety days of the Court of Appeals' order denying rehearing *to the Jacksons*. (Bishofberger Pet. at 1) The Bishofbergers, however, never filed a petition for rehearing in the Court of Appeals; the petition to which they refer was filed solely by the Jacksons and not joined in by the Bishofbergers and is therefore irrelevant to the timeliness of the Bishofbergers' Petition for certiorari. The Jacksons' petition for rehearing (which the Bishofbergers did not even bother to append) sought relief particular to the Jacksons alone. Their petition entitled "Petition for Rehearing by Plaintiffs-Appellants MacDaniel Jackson and Miriam Jackson," states explicitly that "[i]n this Petition for Rehearing,the Jacksons do not seek rehearing as to any Appellants other than the Jacksons, nor as to any appeal other than the Jacksons' appeal." (App. at 2a) Indeed, the fact that the Bishofbergers felt the need to file this very Petition for certiorari in addition to the Tolands' and the Jacksons' filings indicates their own recognition that any relief granted by this Court to any other petitioners would not encompass the Bishofbergers' claims absent a separate filing of the type they failed to make in the Court of Appeals.

Although Supreme Court Rule 13.3 states that a timely motion for rehearing tolls "for all parties" the running of the three months' period in which a petition for certiorari may be

presented to this Court, this rule benefits only those petitioners for whom the motion for rehearing "actually seeks an 'alteration of the rights adjudicated' in the lower court's first judgment." *FCC* v. *League of Women Voters*, 468 U.S. 364, 373 n.10 (1984) (quoting *Department of Banking* v. *Pink*, 317 U.S. 264, 266 (1942)). As the Jacksons' petition for rehearing could have had no effect on the Court of Appeals' adjudication of the Bishofbergers' rights, the Jacksons' petition did not toll the running of the filing period for the Bishofbergers.[6] *See FTC* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 212 (1952) (dismissing petition for certiorari as untimely because lower court's subsequent order did not "disturb[ ] or revise[ ] legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality"); *Department of Banking*, 317 U.S. at 266 (holding that petition for certiorari was untimely where motion to amend below did not seek an alteration of the rights adjudicated and therefore the finality of the lower court's prior order was never suspended). As this Court has held that the ninety-day limit for filing a petition for certiorari in a civil action is mandatory and jurisdictional, *see Missouri* v. *Jenkins*, 495 U.S. 33, 45 (1990), the Bishofbergers' Petition should be denied as untimely.

II. NEITHER PETITION RAISES ANY ISSUE WORTHY OF THIS COURT'S CONSIDERATION

Wholly apart from their failure to file a timely petition, the Bishofbergers do not even attempt to identify any legal authority (much less any intercircuit controversy) in support of their Petition. Stymied by their admitted receipt of the Class Notice over *one month* prior to the opt-out deadline and

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[6] The Bishofbergers were in no way a "party" to the Jacksons' appeal to the Court of Appeals, as is evident on the faces of the separate Notices of Appeal they filed. (A1681; A1684) The appeals were consolidated for briefing and argument purely as a matter of judicial economy.

their failure to act on such Notice, the Bishofbergers instead embark upon a lengthy diatribe in which they accuse PSI, Class Plaintiffs, Lead Class Counsel and the District Court of conspiring to create a "Kafkaesque proceeding." (Bishofberger Pet. at 8) While the Bishofbergers' paranoid conspiracy theory might make for an entertaining Oliver Stone production, it simply does not implicate any issue worthy of this Court's consideration.

Similarly, the issues sought to be raised by the Jacksons' Petition amount to nothing more than yet another request for error-correction which, even if meritorious, would not warrant the exercise of this Court's certiorari jurisdiction. *See* Supreme Court Rule 10. Their contentions, which repeat the same tired arguments heard and rejected by the courts below, are wholly without merit. The Jacksons follow the Tolands' lead in contending that the notice procedures did not comply with this Court's rulings in *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), and *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974), because they failed to ensure that each Class Member actually *received* the Notice at the proper address. As discussed in PSI's brief opposing the Tolands' Petition, however, there is no support for the proposition that due process requires actual receipt by every absent class member of a mailed notice of a proposed class settlement. (*See* Br. Opp. at 22-24) Rather, what is required is that notice procedures be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane*, 339 U.S. at 314.

The plethora of cases cited by the Jacksons in their Petition (many of which were not cited to the Court of Appeals) do not dictate a different result. Instead, the legal authority relied on by the Jacksons only underscores the holding of the court below, consistent with *Mullane* and *Eisen*, that due process requires not perfect notice but the "best notice practicable under the circumstances." *See, e.g., Mennonite Board of Mis-*

sions v. *Adams*, 462 U.S. 791, 800 (1983) (holding that notice by mail "or other means as certain to ensure actual notice" is required to satisfy due process); *Greene* v. *Lindsey*, 456 U.S. 444, 454 (1982) (noting that "reasonableness of the notice provided must be tested with reference to the existence of `feasible and customary' alternatives and supplements to the form of notice chosen") (quoting *Mullane*, 339 U.S. at 315).[7]

In essence, the Jacksons argue that each and every one of the 100,000-plus addresses on the PSI database specifically created to provide a list of affected investors for the SEC Fund should have been verified and re-verified to guarantee 100% accuracy before the Notices were mailed. There is simply no support for this Jacksonian view of the requirements of due process. *See, e.g.*, *Peters* v. *National Railroad Passenger Corp.*, 966 F.2d 1483 (D.C. Cir. 1992) (no due process violation where address on mailing list was inaccurate); *Gross* v. *Barnett Banks, Inc.*, 934 F. Supp. 1340, 1345 (M.D. Fla. 1995) (verification of addresses on mailing list not required to satisfy due process).

Finally, to support their contention that the District Court incorrectly judged the adequacy of the Notice by the more lenient standards of Rule 23(e) (Jackson Pet. at 20-22), the Jacksons distort the District Court's Opinion. The Jacksons assert that the District Court relied exclusively on Rule 23(e)

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[7] The Jacksons also cite this Court's decision in *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985), as authority for their ill-conceived argument that due process requires actual receipt of a mailed notice. *Shutts*, however, is factually inapposite to the present case as it addresses the question of a court's exercise of personal jurisdiction over out-of-state class plaintiffs. Moreover, in relying on *Mullane*, *Shutts* actually reinforces the District Court's holding that notice to absent class members need only be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 811 (quoting *Mullane*, 339 U.S. at 314-15). *See also Gross* v. *Barnett Banks, Inc.*, 934 F. Supp. 1340, 1344 (M.D. Fla. 1995) (citing *Shutts* for holding that actual receipt of mailed notice not required to satisfy due process).

cases. A plain reading of the Opinion which expressly relies on *Mullane* and *Eisen*, however, demolishes this contention. (Jackson Pet. App. at 53)[8]

Equally unpersuasive is the Jacksons' attempt in Part III of their Petition to manufacture an issue regarding the standard of review. The Jacksons contend that the Court of Appeals erroneously applied an abuse of discretion standard and failed to conduct a *de novo* review of the District Court's denial of their Rule 60(b)(4) motion. (Jackson Pet. at 25-26) First, this argument ignores that the Jacksons moved for relief on numerous grounds, including Rules 60(b) and 6(b). (Jackson Pet. App. at 69-71) In reviewing the District Court's denial of the Jacksons' motions under these rules—including the District Court's determination that the Jacksons had failed to satisfy their burden of demonstrating excusable neglect—the Court of Appeals properly applied an abuse of discretion standard. *Browder* v. *Director, Department of Corrections*, 434 U.S. 257, 263 n.7 (1978) (appeals from denials of Rule 60(b) motions reviewed "only for abuse of discretion"); *Lujan* v. *National Wildlife Federation*, 497 U.S. 871, 895-96 (1990) (Rule 6(b) confers discretionary standard). Second, as to the Jacksons' Rule 60(b)(4) motion, the Court of Appeals did in fact conduct a *de novo* review of the Notice procedures.[9] That

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[8] The Jacksons blatantly and inexcusably ignore that part of the District Court's opinion which discussed *Mullane* and *Eisen* and instead point to the court's citation to *Grunin* v. *International House of Pancakes*, 513 F.2d 114 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975), as evidence of its putative error. Although *Grunin* involved Rule 23(e) notice, the Eighth Circuit cited *Eisen* for the proposition that due process does not guarantee receipt of class notice—a proposition that is nowhere refuted in any case cited by the Jacksons (or, for that matter, the Tolands).

[9] A review of the transcript of the oral argument of these consolidated appeals (which the Jacksons' Supreme Court counsel did not attend) will reveal that the Court of Appeals, through its vigorous questioning of PSI's counsel regarding the adequacy of the notice pro-

the Court of Appeals, which heard six consolidated appeals of multiple appellants, did not explicitly enumerate its approval of the notice procedures in its opinion does not warrant the inference that it did not conduct the proper inquiry.

CONCLUSION

The Petitions for writs of certiorari should be denied.

Dated: New York, New York
May 28, 1997

Respectfully submitted,

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cedures, did in fact review the adequacy of the notice procedures *de novo* prior to addressing Judge Pollack's alleged abuses of discretion.

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 95-9209 (Lead) and 96-7147 (Con)

In Re: PRUDENTIAL SECURITIES INCORPORATED LIMITED PARTNERSHIP LITIGATION, MDL DOCKET NO. 1005

MATT NILSON, DAVID MATUS, MELINDA MATUS, LESLIE BISHOFBERGER, DOROTHY BISHOFBERGER, THOMAS BARRETT, JAMES M. BARRETT, REBECCA BARRETT, Executrix of the Estate of James Barrett, CARL ROBA, JAY JABLONSKI, VINCENT LAZARA, and JEFFREY A. SCHILLER,

Movants-Appellants,

—v.—

PRUDENTIAL SECURITIES INCORPORATED,

Respondent-Appellee.

JOHN D. TOLAND and CHRISTAL TOLAND, as husband and wife and d/b/a The John Toland Company, MACDANIEL JACKSON, and MIRIAM JACKSON,

Plaintiffs-Appellants,

—v.—

IN RE: PRUDENTIAL SECURITIES INCORPORATED LIMITED PARTNERSHIP LITIGATION,

Defendant-Appellee.

PETITION FOR REHEARING, BY PLAINTIFFS-APPELLANTS MACDANIEL JACKSON and MIRIAM JACKSON

Plaintiffs-Appellants MacDaniel Jackson and Miriam Jackson (the "Jacksons") respectfully make this Petition to this Court of Appeals, for the Court's rehearing of this matter as to the appeal made herein by the Jacksons, with respect to the Court's Summary Order filed December 27, 1996, a copy of which Summary Order is attached hereto as Exhibit A, insofar as the Summary Order is dispositive of the appeal of the Jacksons.

The appeal of the Jacksons was ordered previously by this Court to be consolidated with appeals herein by other Appellants. In this Petition for Rehearing, the Jacksons do not seek rehearing as to any Appellants other than the Jacksons, nor as to any appeal other than the Jacksons' appeal.

THIS COURT'S SUMMARY ORDER FAILED TO ADDRESS THE JACKSONS' ARGUMENT AS TO "SETTLED CLAIMS" UNDER THE CLASS SETTLEMENT RELEASE

In the Jacksons' Supplemental Brief and the Jacksons' Supplemental Reply Brief herein, the Jacksons argue, *inter alia*, that their claim against Appellee Prudential Securities Incorporated ("PSI"), based upon PSI's failure to supply the class notice and mailing administrators with the Jacksons' address

last-known to PSI, for use in sending the Jacksons notice of the pendency of the class action and of the Jacksons' right to opt out of the class action, is not a matter within the "Settled Claims", as the term "Settled Claims" is defined by the parties' Settlement Agreement (A 71).[1]

Consequently, such claim of the Jacksons was not agreed, by the parties' Settlement Agreement, to be released in settlement of the class action. Further, the District Court's Order No. 44, as amended (A 1523, A 1677), erroneously fails to permit the Jacksons to maintain their said claim in a pending arbitration proceeding against PSI, based upon PSI's failure to supply and utilize the Jacksons' said last-known address.

The Jacksons argued the above points, including the Jacksons' citation of dispositive precedent of this Court of Appeals and of the District Court for the Southern District of New York, within the Jacksons' Supplemental Brief and Supplemental Reply Brief. The Jacksons' argument on this point was not discussed, nor was the Jacksons' argument on this point decided, by the Summary Order.

THE DISTRICT COURT ERRED IN NOT PERMITTING THE JACKSONS TO MAINTAIN A CLAIM IN THE JACKSON ARBITRATION BASED ON PSI'S FAILURE TO PROVIDE THE JACKSONS' KNOWN, CORRECT ADDRESS

Numbered paragraph 6 of the District Court's Class Order compromised and resolved "Settled Claims" against PSI, and enjoined the prosecution of any "Settled Claims" against PSI (A 645). The Class Order also provided that capitalized terms used therein would be given the meaning defined in the parties' Settlement Agreement (A 641). The Settlement Agree-

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[1] Parenthetical references are as follows, unless otherwise specified: References to "A", followed by a page number, are references to the parties' Joint Appendix on appeal; References to Appellants' Supplemental Briefs are designated "App. Supp." and the Appellants' names, followed by a page number.

ment, in turn, defined "Settled Claims" in its numbered paragraph 21 (A 71) as follows:

> "21. 'Settled Claims' means any and all claims, rights or causes of action or liabilities whatsoever, whether based on federal, state, local, statutory or common law or any other law, rule or regulation, including both known and unknown claims, that have been, could have been, or in the future might be asserted in any forum by the Class Members or any of them or the successors and assigns of any of them, whether directly, indirectly, representatively, derivatively or in any other capacity, against any of the Released Parties, in connection with or which arise out of or relate in any way to *the allegations, transactions, facts, matters or occurrences, representations or omissions involved, set forth or referred to in the Consolidated Complaint*, or which relate in any way to *the marketing, purchase, sale or holding of Units or other interests in*, or to *the operation, oversight, monitoring or management of, any of the Partnerships during the Class Period*." (emphasis added)

Thus, reduced to its essence, the definition of "Settled Claims" refers to any of a number of legal claims, described in the first one-half of the above lengthy definition: (1.) Which are in connection with, or which arise out of, or which relate in any way to, the *allegations, facts and other matters, involved or referred to in the Consolidated Complaint*; or (2.) Which relate in any way to the *marketing, purchase, sale or holding of Partnership interests during the Class Period*; or (3.) Which relate in any way to the *operation, oversight, or management of the Partnerships during the Class Period*.

The contracting parties' above definition of "Settled Claims" is a definition which is *stated with reference to the factual transactions or factual allegations* which are referred to in, and which underlie, the Consolidated Complaint: For example, alleged RICO violations, or alleged fraud in mar-

keting of Partnership interests. The Consolidated Complaint was described by the District Court as follows:

"C. The Consolidated Complaint.

. . . . .

"14. Count I of the Consolidated Complaint alleges RICO violations under 18 U.S.C. § 1962(c) and a civil RICO conspiracy under 18 U.S.C. § 1962(d) . . . Count I also serves as a model for pleading thirty-four additional RICO violations under 18 U.S.C. § 1962(c) and thirty-four violations under 18 U.S.C. § 1962(d) that follow the same pattern as Count I but substitute the different groups of conspirators, RICO enterprises, and offering periods listed in Appendix H. Through a similar procedure, Count II asserts thirty-five RICO violations under 18 U.S.C. § 1962(a) and thirty-five violations of 18 U.S.C. § 1962(d). Counts III through V allege that all defendants named in the Consolidated Complaint conspired together to commit racketeering acts and to violate 18 U.S.C. §§ 1962(a) and (c). The remaining counts allege fraud (Count VI), negligent misrepresentation (Count VII), breach of fiduciary duty (Count VIII), breach of a third-party beneficiary contract (Count IX), breach of implied covenant (Count X), and violations of New Jersey's RICO statute (Count XI). Counts VI through VIII allege that nearly all of the defendants named in the Consolidated Complaint are jointly and severally liable for one another's torts. Count IX is directed exclusively at PSI while Count X is directed exclusively at Prudential Insurance. Count XI duplicates the first five federal counts, but is brought pursuant to an analogous state statute, N.J. Stat. §§ 2C:41-1 *et seq.*, that state's RICO statute. . . ." District Court's Findings of Facts and Conclusions of Law, Sec. II (C.) (14.). (A 592 *et seq.*, at para. 14.)

The Settlement Agreement, by its clear terms, was directed to claims arising with reference to the Partnerships' management, marketing and sale, and the RICO, fraud and other factual allegations and matters referred-to in the Consolidated Complaint. If language used by parties in a contract is unambiguous, a court must enforce the plain, ordinary and common meaning of those terms *as a matter of law*, without reference to extrinsic evidence. *John Hancock Mutual Life Insurance Company v. Amerford International Corporation*, 22 F.3d 458, 462 (2nd Cir. 1994); *Chrysler Capital Corporation v. Bankers Trust Company*, 810 F. Supp 74, 76 (S.D. N.Y. 1992).

Any failure of PSI to give the Class Counsel the Jacksons' accurate address, last-known to PSI, for mailing the Jacksons the Class Notice of the class membership hearing in this proceeding, is *not* any of the types of matters defined as a "Settled Claim" in PSI's Settlement Agreement. Such a PSI failure is not a matter in connection with, arising out of, nor related in any way to alleged RICO or other wrongs, nor facts nor other "matter involved in or referred to in the Consolidated Complaint."; It is not a matter "related in any way to the marketing, purchase, sale or holding of the Partnership interests during the Class Period"; And it is not a matter "related in any way to the operation nor management of the Partnerships during the Class Period".

The clear direction of the settlement release, to the alleged RICO and other wrongs, and other factual matters underlying the Consolidated Complaint, is shown by the language the settling parties used, and by the treatment they gave these matters, in their Settlement Agreement. Under the heading "*TERMS AND CONDITIONS OF THE SETTLEMENT*", on Page 11 of the Settlement Agreement (A 75), the settling parties make provision for various terms, including, in numbered paragraph 34 thereof, the basic agreement to settle (*Ibid.*). Thereafter, commencing on Page 21 of the Settlement Agreement (A 85), in an entirely separate discussion, are provisions entitled "*CLASS CERTIFICATION CLASS NOTICE, AND SETTLEMENT FAIRNESS HEARING*". Indeed, PSI's duty to

provide putative Class members' addresses and other information is contained in yet another separate section of the Settlement Agreement, entitled "*MISCELLANEOUS*" commencing on Page 25 (A 89). The clear meaning of the parties' contract terms is that matters of "Class certification, class notice and the Settlement Fairness Hearing" are treated separately and distinctly from the parties' basic agreement to settle the dispute, and the matters which the settlement is to resolve.

Alternatively, PSI's duty to provide a correct address of the Jacksons, known to PSI, for use by Class Counsel in mailing notices in this litigation, may be viewed as arising pursuant to the District Court's "'Preliminary Order in Connection with Settlement Proceedings" (A 184 *et seq.*):

> ". . . The PSI Settling Defendants shall cooperate in making their books, records and information available to Lead Class Counsel or their agent for the purpose of identifying and giving notice to the Class." (A 191)

Indeed, the parties' settlement contract illustrates the distinction which that contract makes, between the "Settled Claims" to be settled thereby, and, by contrast, other matters in execution of the litigation settlement. The two matters—the "Settled Claims" and the other duties—are spoken of separately, at the conclusion of the same sentence:

> "45. The obligations of the Class Members and the PSI Settling Defendants under this Settlement Agreement shall be in full settlement . . . of the Settled Claims . . . and the Released Parties shall have no other or further liability or obligation to the Class . . . with respect to the Settled Claims except to fulfill the obligations created hereunder." (A 84) (emphasis added)

Given the unambiguous language which the settling parties used in limiting the settlement release to the RICO, fraud and other factual allegations contained in the Consolidated Com-

plaint, the plain meaning of the parties' chosen language should be applied. As this Circuit Court of Appeals stated in a prior case:

> "Language whose meaning is otherwise plain is not ambiguous *merely because the parties urge different interpretations in the litigation.* (citation omitted) The court should not find the language ambiguous on the basis of the interpretation urged by one party, where that interpretation would 'strain [ ] the contract language beyond its reasonable and ordinary meaning.' (citation omitted)
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> *"The parties' rights under an unambiguous contract should be fathomed from the terms expressed in the instrument itself rather than from extrinsic evidence as to terms that were not expressed or judicial views as to what terms might be preferable. . ." Metropolitan Life Insurance Company v. RJR Nabisco, Incorporated*, 906 F.2d 884, 889 (2nd Cir. 1990). (applying New York law) (emphasis added)

John Hancock Mutual Life Insurance Co. v. Amerford International Corp., supra; *Natwest USA Credit Corp. v. Alco Standard Corporation*, 858 F. Supp. 401 (S.D. N.Y. 1994).

The plain meaning of the Settlement Agreement, and the single and only meaning of which said definition is susceptible, is that "Settled Claims" are defined as claims having reference to the RICO, fraud and other factual matters alleged in, and underlying, the Consolidated Complaint, and with reference to PSI's marketing and management of its Partnerships. This unambiguous meaning thus excludes, by its express terms, the Jacksons' claim against PSI based on PSI's provision of a known-incorrect address for the Jacksons, and the District Court erred in prohibiting the Jacksons from bringing an arbitration claim based on PSI's deliberate use of an incorrect address for the Jacksons.

CONCLUSION; RELIEF SOUGHT

The Jacksons respectfully request this Court rehear this matter as to the Jacksons' appeal, and reconsider this Court's said Summary Order as to the Jacksons' appeal, as to this Court's failure in said Summary Order to address the Jacksons' argument concerning "Settled Claims" in relation to the parties' Settlement Agreement in this matter, all as described hereinabove and in the Jacksons' previous Supplemental Brief and Supplemental Reply Brief, and that the District Court's Order No. 44, as amended, be modified as requested in the Jacksons' previous Supplemental Brief and Supplemental Reply Brief, and for such other and further relief to which the Jacksons might show themselves to be entitled.

Respectfully submitted,
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